

of \$545 per week for 98.77 weeks, or \$53,829.65, followed by permanent total disability benefits at the rate of \$545 per week for the duration of claimant's permanent total disability, not to exceed \$93,750, all of which is due and owing in one lump sum, less amounts previously paid (temporary and permanent disability compensation), subject to respondent's subrogation credit.

IT IS SO ORDERED.

Dated this _____ day of December, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENTING OPINION

I have three concerns. First, I disagree with my colleagues regarding the calculation of the amount of preexisting impairment to be deducted from claimant's award. Second, the *Ward* methodology has no statutory basis. Third, the *Ward* methodology, as explained in *Ballard II*, actually diminishes the employer's statutory reduction of an award for preexisting impairment contained in K.S.A. 2010 Supp. 44-501(c).

As for the first point, under *Ward*, if claimant had a \$100,000 permanent partial disability award, the award would be reduced to \$75,000 based on a \$25,000 reduction for his 25% preexisting impairment.² I disagree with the *Ward* rationale. The amount of preexisting impairment should be calculated the same way that the law tells us how to calculate the value of impairment under K.S.A. 44-510e(a)(1-3). The amount of a 25% preexisting impairment in this case is \$56,543.75,³ not \$25,000.

² As explained below.

³ 415 weeks x 25% = 103.75 weeks x \$545 = \$56,543.75.

While I disagree as to the amount of the reduction, the amount of a reduction for a 25% preexisting impairment should be a fixed number and remain the same regardless of the size of a worker's award. Instead, the majority determined the amount of claimant's preexisting impairment on a sliding scale dependent on the amount of the award. The Board multiplied claimant's permanent total disability award of \$125,000 by 25% to arrive at a \$31,250 reduction. If the amount of preexisting impairment was \$25,000 for one purpose, it should still be \$25,000 and not increase to \$31,250 because claimant's condition worsened.⁴ There is nothing in the Act stating that a more severely injured worker should have a disproportionate deduction for preexisting impairment.

Regarding the second point, I certainly agree that the reduction in K.S.A. 44-501(c) should be a meaningful reduction. However, the application of any such reduction should be rooted in statute. Unfortunately, the *Ward* methodology for reducing an award by a *percentage* of the award is contrary to the plain language of the Act.

Bergstrom states:

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).⁵

Tyler states:

Judicial blacksmithing will be rejected even if such judicial interpretations have been judicially implied to further the perceived legislative intent.⁶

K.S.A. 2010 Supp. 44-501(c) states:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Cady states:

⁴ The undersigned Board Member signed the prior *Ballard* award indicating the reduction would be \$31,250. Such language was dicta, not the holding of the prior decision.

⁵ *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

⁶ *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

The most fundamental rule of statutory interpretation is that the intent of the legislature governs if that intent can be ascertained. This court must first attempt to ascertain legislative intent by reading the language of the statute and giving common words their ordinary meanings. When a statute is plain and unambiguous, this court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. *Stewart Title*, 294 Kan. at 557, 276 P.3d 188. But when the statute's language or text is unclear or ambiguous, this court employs "canons of construction, legislative history, or other background considerations to divine the legislature's intent and construe the statute accordingly. [Citation omitted.]" 294 Kan. at 564-65, 276 P.3d 188.⁷

Ward states, "The express language of K.S.A. 44-501(c) requires that a claimant's award of compensation be reduced by his or her percentage of preexisting functional impairment."⁸ It is worth noting K.S.A. 2010 Supp. 44-501(c) does not expressly state an award is to be reduced by a *percentage* of preexisting impairment. The statute states an award is to be reduced by an *amount*. That "amount" might be a dollar figure or it could be a percentage. The statute is vague. Vagueness notwithstanding, the statute simply does not say, either clearly, plainly or unambiguously, that an award should be reduced by a percentage.

Ward not only inserts the word "percentage" into K.S.A. 2010 Supp. 44-501(c), or perhaps replaces the word "amount" with "percentage," it also equates every percentage point for a \$100,000 award as being worth \$1,000: "[W]e determine that the 15% preexisting functional impairment should have been applied against the \$100,000 cap, thus, allowing a compensation award of \$85,000."⁹ The concept that every percentage of impairment is valued at \$1,000 is found nowhere in the Act. Indeed, the value of functional impairment is dependent on many factors, including a worker's average weekly wage, the compensation rate and how much temporary disability benefits may have been paid.

In terms of a potential solution, K.S.A. 2010 Supp. 44-501(c) so lacks direction that a straightforward approach may not be feasible. One method might be to at least partially adopt Judge Atcheson's approach in *Jamison*.¹⁰ Judge Atcheson stated a plain reading

⁷ *Cady v. Schroll*, 298 Kan. 731, 738-39, 317 P.3d 90 (2014).

⁸ *Ward v. Allen Cty. Hosp.*, 50 Kan. App. 2d 280, 282, 324 P.3d 1122 (2014).

⁹ *Id.* at 294.

¹⁰ *Jamison v. Sears Holding Corp.*, No. 109,670, 2014 WL 1887645 (Kansas Court of Appeals unpublished opinion filed May 9, 2014). Judge Atcheson agreed with the *Ward* ruling as requiring a percentage reduction in an award, specifying that a \$75,000 award should be reduced by \$7,500 for a 10% preexisting impairment. As noted above, I cannot identify a statute instructing that an award be reduced specifically by a percentage. K.S.A. 2010 Supp. 44-501(c) only references an "amount."

of the Act first requires the reduction in K.S.A. 2010 Supp. 44-501(c) before applying the cap under K.S.A. 44-510f.

Judge Atcheson noted K.S.A. 44-510f does not contain the term “award” or “any award.” Rather, the statute provides limits for the “maximum compensation benefits” payable by an employer. Further, the term “award” is used in K.S.A. 44-510e(a) and such statute describes how to calculate an award. He concluded:

Based on that statutory configuration, I would conclude that “any award” to be reduced by a preexisting functional impairment in conformity with K.S.A. 2010 Supp. 44-501(c) includes the amount computed under K.S.A. 44-510e(a), since it is statutorily described as an “award.” And the statutory cap in K.S.A. 44-510f(a)(3) would then be applied to the reduced award to arrive at the “compensation benefits” the employer must pay.

...

The panel in *Ward* and my colleagues here would first apply the cap and then reduce the compensation benefits, rather than an award, by the preexisting functional impairment. My approach conforms to the well-accepted rule of statutory construction, particularly appropriate here, that a word ordinarily should be given the same meaning throughout a statute or a unified statutory scheme. . . . The canon takes on particular force here in that K.S.A. 2010 Supp. 44-501(c) and K.S.A. 44-510e(a) both address the computation of awards and the term “award” is integral to workers compensation law. The *Ward* decision deviates from the statutory language of K.S.A. 44-501(c) to apply the reduction for a preexisting functional impairment to the “compensation benefits” determined under K.S.A. 44-510f(a)(3) rather than the “award” computed under K.S.A. 44-510e(a).

More pragmatically, the *Ward* approach leads to anomalous outcomes in some circumstances, giving some employers windfalls. My application does not. An example illustrates the problem. Suppose John Doe has a 20 percent preexisting functional impairment and under the computation in K.S.A. 44-510e, the “resulting award” for his pending permanent partial disability claim is \$120,000. Widget, Inc., his employer, shouldn't be responsible for that portion of the award attributable to the preexisting condition. Under my approach, the award should be reduced by 20 percent or \$24,000 to \$96,000. The award would not be subject to the \$100,000 cap. Under the *Ward* approach, the cap would be applied first to reduce the award to \$100,000 and then the 20 percent functional impairment would be applied to reduce the award to \$80,000. Compare that result with Jane Smith, an employee of Sprockets, Inc., who receives a permanent partial disability award of \$96,000 and has no preexisting impairment. So far as the workers compensation scheme is concerned, Doe and Smith suffered equivalent on-the-job harm after taking account of Doe's preexisting condition. But Widget and Sprocket wind up owing substantially different amounts under *Ward*. The result doesn't square with that scheme and creates an anomaly where there needn't be one.

The *Ward* approach rests on a fallacy that whenever a worker has a preexisting functional impairment and the computed award for a permanent partial disability exceeds the \$100,000 cap, the cap amount must be reduced. Take, for example, Richard Roe, another employee of Widget. Roe's on-the-job injury results in a permanent partial disability award of \$120,000, and he has a preexisting functional impairment of 5 percent. Reducing the award for the preexisting impairment, Roe suffered a compensable harm from the current injury equal to 95 percent of that amount or \$114,000. The cap should then be applied to reduce the amount to \$100,000. But *Ward* would apply the 5 percent to the cap amount, resulting in a payment of \$95,000 even though the current injury, already adjusted for the preexisting condition, warrants an award in excess of \$100,000. In that circumstance, Widget would receive an artificial double reduction in the amount owed for the current injury by virtue of the cap and the preexisting condition. But that is not what the statutory scheme contemplates. Rather, the cap should be applied after the adjustment for any preexisting functional impairment, so the resulting amount actually reflects the statutorily mandated compensation for the current injury.¹¹

Judge Atcheson proposes reducing an “award” by preexisting impairment under K.S.A. 2010 Supp. 44-501(c) prior to applying the limit in K.S.A. 44-510(f) for “maximum compensation benefits.” As he noted, this approach can result in workers recovering a maximum award. However, as the “amount” considered by K.S.A. 2010 Supp. 44-501(c), I would use a dollar figure based on the value or amount of a claimant’s preexisting impairment instead of reducing an award by a percentage. For instance, Mr. Ballard’s 87.5% work disability would result in an uncapped award of \$197,905.85 (415 weeks x 87.5% = 363.13 weeks x \$545 = \$197,905.85). Reducing such amount by the value of his 25% preexisting impairment (\$56,543.75) results in an uncapped award of \$141,262.10. Applying the K.S.A. 44-510f cap results in a \$100,000 in maximum compensation benefits.¹²

My third concern is that *Ward* and *Ballard II* do not account for the actual amount of a worker’s preexisting impairment. It is true that *Ward* cautions its approach should only be used where a claimant’s work disability exceeds the \$100,000 statutory cap and a claimant will reach the statutory cap before the statutory maximum number of weeks have been exhausted. However, *Ballard II* says, “there appears to be no statutory justification for calculating an award involving preexisting functional impairment differently based on the type of claim involved”¹³ and that K.S.A. 44-501(c) does not distinguish between different types of disabilities. Under this rationale, the statutory reduction should be the

¹¹ *Id.*, slip op. at 22.

¹² Admittedly, this approach does not fit nicely when it comes to permanent total disability cases. Still, K.S.A. 44-501(c) does not clearly instruct us to reduce any award by a percentage of the total award.

¹³ *Ballard v. Dondlinger & Sons Constr. Co.*, 51 Kan. App. 2d ___, 355 P.3d 707, 713-14 (2015).

same for any claim regardless of the amount of the award. As can be seen in the next paragraph, *Ward*, as expanded in *Ballard II*, substantially diminishes the statutory reduction in situations involving awards of less than \$100,000.

Hypothetically, if Mr. Ballard only had a 44% work disability, he would be entitled to \$99,517 (415 weeks x 44% = 182.6 weeks x \$545 = \$99,517). Deducting the amount of his 25% preexisting impairment (\$56,543.75) results in an award of \$42,973.25.¹⁴ If the *Ward/Ballard II* approach is used, the reduction is artificially reduced to \$24,879.25 (25% of \$99,517 = \$24,879.25) and the award would be \$74,637.75.

While *Ward* arguably provides a meaningful reduction for awards exceeding \$100,000, applying the same methodology, as expanded in *Ballard II*, results in an employer having a less meaningful reduction in cases valued at under \$100,000.

Even if the cautionary language in *Ward* is followed, it still makes no logical sense for the amount of a 25% impairment to vary – \$56,543.75 for an award under \$100,000, \$25,000 for an award of \$100,000 and \$31,250 for an award of \$125,000. The amount or quantity of preexisting impairment should be a constant. Reducing an award by a percentage of the total award, as was done in *Ward*, does not have statutory support in the Act.

BOARD MEMBER

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Honorable Ali Marchant, Administrative Law Judge

¹⁴ Deducting the amount of preexisting impairment as a percentage (44% - 25% = 19%) and calculating the amount of a 19% whole body rating provides the same result.